92-1366

Supreme Court, U.S.
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No.

UNITED STATES SUPREME COURT

OCTOBER TERM, 1992

JOHN W. DECAMP,

Petitioner,

vs.

THE DOUGLAS COUNTY FRANKLIN GRAND JURY; MICHAEL FLANAGAN, FOREMAN IN HIS OFFICIAL AND INDIVIDUAL CAPACITY; JOHN DOES 1-15 INDIVIDUAL GRAND JURORS; GRAND JURY PROSECUTORS SAMUEL VAN PELT & TERRY C. DOUGHERTY, IN THEIR INDIVIDUAL CAPACITIES,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THEUNITED STATES EIGHTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

John W. DeCamp
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QUESTION PRESENTED FOR REVIEW

Whether special prosecutors for investigative grand juries enjoy absolute immunity under 42 U.S.C. SS. 1983 from any actions against them for conduct which is unrelated to the initiation of criminal prosecutions or in presenting the state's case.

PARTIES TO THESE PROCEEDINGS

The parties to these proceedings herein are identified on the cover page.

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The opinions and orders of the Eigth Circuit Court of Appeals and the Honorable Warren Urbom, United States District Court of Nebraska are not reported. They are reproduced in the appendix herein.

JURISDICTION

1. Date of judgment for which Petitioner seeks review

The date the Eighth Circuit Court of Appeals entered the judgement from which Petitioner seeks review was November 2, 1992.
Petitioner requested no rehearings.

2. Jurisdiction for writ of certiorari

This Court has jurisdiction to grant this writ of certiorari under 28 U.S.C. 1254.

3. Federal Statute Involved

This case concerns 42 U.S.C. 1983. Its text is located in the appendix herein.

STATEMENT OF THE CASE

John W. DeCamp, Petitioner, a Nebraska lawyer, seeks review of the decision of the Eighth Circuit Court of Appeals which affirmed the Federal District Court of Nebraska's dismissal of his 1983 action against the Douglas County Nebraska Franklin Grand Jury, its foreman, its individual members and its two special prosecutors, Samuel Van Pelt and Terry Dougherty.

The Douglas County Franklin Grand Jury was a special grand jury formed to investigate the November, 1988 failure of the Franklin Credit Union and closing by the federal authorities, and to investigate allegations that prominent citizens connected to the Franklin Credit Union's principals were involved in child sexual abuse.

DeCamp, in direct response to press questions put to him about the credit union failure, gave written responses directly to the reporters who asked the questions. The press questions and the DeCamp answers concerned the very public issue of the investigation of the Franklin Credit Union. DeCamp's response to the press questions subsequently came to be known as the "DeCamp Memo."

DeCamp's press response occurred before there ever was a Grand Jury and suggested, among other things, that a Grand Jury should be called to investigate the Franklin Credit Union failure and all matters surrounding the failure.

Subsequent to DeCamp's press responses, two separate grand juries, State and Federal, were called to investigate the Franklin Credit Union failure.

The conduct of which DeCamp complains concerned the portions of the grand jury report that offered gratuitous explanations and condemnations of a host of individual, private citizens, including specifically DeCamp.These individual, private citizens, including specifically DeCamp, were not a target or subject of the grand jury investigation, and, it goes without saying, were not indicted or in any way prosecuted by the grand jury.

In DeCamp's specific case, he was not asked or offered the chance to appear before the grand jury. DeCamp had no way of knowing the grand jury intended or contemplated publicly condemning DeCamp for his daring to express to the press - in reponse to press questions- his personal opinion on the Franklin Credit Union failure, its origins including the failure of institutions of government and personalities involved in the failure.

The grand jury commented that the "DeCamp Memo'' was ''issued for personal political gain and possible revenge for past actions alleged against him. From personal experience and that bitterness engendered from media attacks, an attorney of his stature should be more discreet." DeCamp alleged in his complaint that the report of a special grand jury, known as the Douglas County "Franklin" grand jury defamed him, deprived him of due process and chilled his exercising First Amendment freedoms.

DeCamp also alleged that the grand jury special prosecutors helped author the grand jury's derogatory comments about him. For

this action Decamp sought injunctive relief and damages from the grand jury, its members and its two specia' prosecutors.

The Nebraska Federal District Court dismissed the entire complaint upon the Defendants' motions. The District Court's order rested entirely on its finding that the grand jury and its prosecutors functioned with absolute immunity when they were acting within the scope of authority in reporting their findings regarding the DeCamp Memo.

The Court also concluded that even if the special prosecutors cooperated in writing the grand jury report, they enjoyed absolute immunity in performing this function since their writing assistance "could fall under the category of giving legal advice authorized by R.R.S. Neb. 23-1208 (Reissue 1987)."

The Eighth Circuit Court of Appeals affirmed the District Court. However the Circuit Judges split on the question of whether the grand jury special prosecutors enjoyed absolute immunity to help author investigative findings that allegedly chill the Petitioner's Constitutional Rights. Judge Heany would have found that the special prosecutors in this case did not have absolute immunity while Judges Fagg and Bowman would have found absolute immunity.

Incredibly enough, these two judges, Fagg and Bowman, also made findings of facts on which to base their decision which "facts" are completely eroneous, were created apparently out of whole cloth by the judges themselves, and which could not have come through the judicial process and were not in any way part of the record.

These "facts" or "findings" include the following statements by the two judges which, as stated, are absolutely false: "We believe the special prosecutors are absolutely immune from SS.1983 liability for helping the grand jury draft an official report permitted by

Nebraska law after the grand jury's investigation into possible criminal activity by the managers of a failed credit union ended without indictments."

Actual fact which this court should now take judicial notice of is this: All principals of the credit union were indicted, convicted and are now in prison. Additionally, others were indicted for child abuse crimes and three of the five named in the "DeCamp Memo" were convicted of credit union fraud or child abuse crimes.

The two judges further conclude in their opinion that the grand jury editorial intrusion into DeCamp's freedom of speech rights was warranted by the fact that ..."DeCamp's accusatory memorandum sent them (the grand jury) on a wild goose chase for 'personal political gain and possible revenge.' "

Again, the two judges have created facts out of whole cloth which do not exist or they have been erroneously fed information outside the judicial process. Judicial notice should be taken by this court that the Attorney General himself asked for a grand jury and that it definitely was not a "wild goose chase" since indictments and ultimately prosecution and conviction occurred for all principals of the credit union as well as others involved in child abuse as alleged in the "DeCamp Memo."

Thus, if the very foundation for the conclusions by the two judges is fabricated and erroneous, how much more erroneous is their final conclusion based on these facts; namely, that the prosecutors were somehow acting within the scope of their official duties in editorializing against private citizens using the grand jury process.

JURISDICTION IN DISTRICT COURT

Jurisdiction was proper in Federal District Court since DeCamp adequately alleged a deprivation of a constitutional right by state

actors. The Eighth Circuit found adequate allegations in the complaint that the report chilled Decamp's free speech freedoms. Federal District Courts have under 28 U.S.C. 1331 & 1343 original jurisdiction over 1983 actions.

ARGUMENT

The District Court erred in dismissing DeCamp's complaint against the special prosecutors Van Pelt and Dougherty. According to his complaint, they intended to chill his first amendment rights, which would not have occurred if their joint efforts with the grand jurors did not carry the mantle of the grand jury's special authority.

Grand jury prosecutors do not enjoy absolute immunity when their activities are not intimately associated with the judicial phase of the criminal process. *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). Prosecutors must act within the scope of prosecutorial duties in order to enjoy absolute immunity. *Price v. Moody*, 677 F.2d 676, 77 (8th Cir. 1982).

The conduct of which DeCamp complains concerned the portionsof the grand jury report that offer gratuitous explanations for his publishing the controversial "DeCamp Memo." Even if Nebraska law authorized grand juries to comment on public figures' statements regarding their investigations, that authority hardly associates intimately their editorializing with the judicial phase of the criminal process.

Prosecutors like other government officials never enjoy a presumption of absolute immunity [*Burns v. Reed*, __U.S.__59 U.S.L.W. 4536, 4538 (1991)]; likewise the Supreme Court has refused to extend absolute immunity any further than warranted. *Id.*

Special Grand Jury prosecutors enjoy no tradition of common

law immunity in the State of Nebraska. Cf. *Burns*, supra 59 U.S.L.W. 4540 {absence of common law immunity for Indiana prosecutors' administrative functions suggests qualified immunity}. The Nebraska legislature even had to impose statutory authority on special prosecutors to allow them to function as legal advisors to grand juries convened in that State. See 29-1408 & 23-1208 R.R.S. Neb. {prosecutors advise grand juries}.

The Franklin Grand Jury prosecutors face no greater risk of unjustified "vexatious litigation" than did the Indiana prosecutors in *Burns*, supra, 59 U.S.L.W. at 4541. Van Pelt and Dougherty also enjoy the heightened protection of qualified immunity which they are free to assert on remand of this case. See *Burns*, supra, 59 U.S.L.W. at 4541 n.8 citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) {objective standard replaced subjective standard as qualified immunity test}.

Van Pelt and Dougherty might assert that other remedies exist for DeCamp. See Burns, id. at 4541. However since the grand jury did not even contemplate charging DeCamp with any crime, the prosecutor's alleged misconduct will not be ever subject to the "crucible of the judicial process". *Burns, id.* at 4541

CONCLUSION

In sum, the Eighth Circuit plurality erroneously ruled that Van Pelt and Dougherty enjoyed absolute immunity from civil litigation for their roles as special prosecutors for the Franklin Grand Jury. The majority judgment of that panel squarely contradicts this Court's rulings in *Burns*, supra, 59 U.S. L.W. 4536 and *Imbler v. Pachtman*, 424 U.S. 409 that prosecutors' absolute immunity extends no further than warranted in order to allow them to start and complete the judicial process of enforcing the law.

For these reasons DeCamp requests a partial reversal of the judgment below and a remand to District Court for further proceedings.

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APPENDIX

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT
No. 91-1260

John W. DeCamp

Appellant,

v.

Douglas County Franklin Grand Jury, Michael Flanagan, Foreman, in his official and individual capacity; John Does, 1-15, individual jurors, in their official and individual capacities; Samuel Van Pelt, in his individual capacity; Terry C. Dougherty, in his individual capacity,

Appellees

Appeal from the United States District Court for the District of Nebraska

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Submitted: October 15, 1991
Filed: November 2, 1992

Before FAGG, Circuit Judge, HEANEY, Senior Circuit Judge, and BOWMAN, Circuit Judge.

HEANEY, Senior Circuit Judge

John W. DeCamp, a Nebraska lawyer, appeals from the district court's dismissal of his 42 U.S.C. 1983 action. The court affirms the district court.

I

DeCamp brought this action against the following defendants in their individual and official capacities: the Douglas County Franklin Grand Jury, Michael Flanagan, Foreman; Samuel Van Pelt, grand jury special prosecuting attorney; and Terry C. Dougherty assistant special prosecuting attorney.

DeCamp alleged the following which we must accept as true when deciding whether the district court properly dismissed his action. The grand jury convened in March 1990 to investigate the failure of the Franklin Community Credit Union as well as charges of child abuse surrounding key figures in the credit union. A memo DeCamp wrote to an Omaha reporter containing information regarding subjects of the investigation played a major role in the formation of the grand jury. DeCamp never appeared before the grand jury which deliberated three months before releasing a report of their findings.

The grand jury's report contained the following statement: "It is our opinion that DeCamp issued his memorandum for personal political gain and possible revenge for past actions alleged against him. From personal experience and the bitterness engendered from media attacks an attorney of his stature should be more discreet."

According to DeCamp, the prosecuting attorneys and the grand jury "co-authored" the grand jury's report and the grand jury released the report. DeCamp claimed the publication of the above statement in an Omaha newspaper defamed him and violated his right to due process under the Fourteenth Amendment. DeCamp also claimed the defendants' actions violated his right to free speech under the First Amendment. He requested expungement of his name from the grand jury's record and report, a written retraction of the statement and damages.

The district court granted defendants' motion to dismiss concluding that the prosecutors and grand jurors possessed absolute immunity. The court found that the grand jurors were acting within the scope of their authority when they reported their findings reqarding DeCamp's memo: DeCamp stated in his complaint that the memo he wrote played a major role in the formation of the grand jury and *Neb. Rev. Statute* SS.29-1401 (Reissue 1989) authorized the grand jury to report on incidents that caused them to be called. *(1)* The court also concluded that the prosecutors did not act outside the scope of their authority if they co-authored the report that mentioned DeCamp because this action "could fall under the category of giving legal advice" authorized by *Neb. Rev. Stat.* SS.23-1208 (Reissue 1987). *(2)*

II.

We first address the issue of subject matter jurisdiction. "[E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction but also that of the lower courts in a cause under review." *Alumax Mill Prods. Inc. v. Congress Fin. Corp.* 912 F.2d 996 1002 (8th Cir. 1990) (citation omitted). DeCamp brought his First Amendment and due process claims under 42 U.S.C. 1983 and his state law defamation claims under the court's pendent jurisdiction. His complaint must allege more than state defamation claims to invoke this court's jurisdiction. See *Nelson v. City of McGehee* 876 F.2d 56 58 (8th Cir. 1989) (defamation alone does not trigger federal cause of action under section 1983). We agree with the district court that DeCamp's claim that the grand jurors intentionally disseminatedtheir report to injure his reputation without providing due process does not state a claim under Section 1983. See *Paul v. Davis,* 424 U.S. 693 (1976) (damage to reputation does not support a finding of a liberty or property interest protected by the Fourteenth Amendment). We conclude, however, that because DeCamp properly stated a First Amendment claim, the court has subject matter jurisdiction over this case. DeCamp claimed that defendants intended to chill his

freedom of speech "by using the position of the Grand Jury to accuse (him) of wrong doing in manner [sic] to prohibit and intimidate (him] from further using his First Amendment rights to criticize public institutions." Although such an allegation would not constitute a section 1983 claim "unless there is also an allegation of some specific injury resulting therefrom," we are satisfied that DeCamp alleged the specific objective harm necessary to state a chilling of his First Amendment rights. *Wade v. Goodwin*, 843 F.2d 1150, 1152 (8th Cir.), cert. denied, 488 U.S. 854 (1988) (setting forth standard). Acording to DeCamp, the defendants' actions caused him to suffer emotional and monetary injuries, including emotional distress and loss of employment and wages. This is sufficient to survive a motion to dismiss. Compare *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) (allegation of subjective chill not substitute for claim of specific present objective harm or threat of specific future harm) with *Riqqs v. City of Albuquerque*, 916 F.2d 582, 584-86 (10th Cir. 1990), cert. denied, 1623 (1991) (plaintiffs alleged chilling of their First Amendment rights and resulting injuries sufficient to survive motion to dismiss). See also *Meese v. Keene*, 481 11.5. 465, 473-74 (1987) (plaintiff alleged and demonstrated more than a subjective chill on motions for summary judgment).

III.

Although we have jurisdiction ovcr DeCamp's claims, we conclude that the district court correctly dismissed DeCamp's claim against the grand jurors because they possessed absolute immunity against liability arising from their "co-authoring" of the report. "[A]bsolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity. " *Imbler v. Pachtman*, 424 U.S. 409, 419 n.13 (1976).

As early as 1872, the Court recognized that it was "a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in

him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself." *Stump v. Sparkman,* 435 U.S. 349, 355 (1978) (quoting *Bradley v. Fisher*, 80 U.S. 335, 347 (1872)). Absolute immunity protects participants in judicial proceedings to help guarantee independent decision-making and prevent harassment and intimidation. See *Johnson v. Kegans*, 870 F.2d 992, 996 (5th Cir.), cert. denied, 492 U.S. 921 (1989).

Grand jurors possess absolute immunity because like a judge they must "exercise a discretionary judgment on the basis of evidence presented to them." *Imbler*, 424 U.S. at 423 n.20 (1976). The grand jurors here acted within the scope of their quasi-judicial statutory authority when they issued a report of their findings. Section 29-1401 limited the grand jurors' report to reviewing that which caused them to be called, but allowed the grand jurors the discretion to decide which of these incidents they would include in the report. Their comments on these incidents involved the exercise of a discretionary, quasi-judicial function absolute immunity protects. Public interest in assuring future jurors that they may peform their duty of exercising independent judgment without fear of reprisal or intimidation in the form of a lawsuit outweighs the rights of the individual who may allege an injury suffered as a result thereof. See *Greenfield v. Courier-Journal and Louisville Times Co.* 283 S.W.2d 839, 840 (Ky. 1955); *State v. Clemmons* 150 So. 2d. 231, 234 (Fla. 1963) (grand jurors may make fair report of their findings even when it reflects adversely upon public official

IV.

I write for myself in this part of the opinion because Judge Fagg and Judge Bowman hold in a separate concurrence that the special prosecutors are also entitled to absolute immunity. Although the grand jurors possessed absolute immunity in this case I conclude that the district court erred in dismissing DeCamp's complaint against the special Prosecuting Attorneys. According to DeCamp's complaint the special prosecutors co-authored the grand jury's report. Implicit

in DeCamp's claim that "defendants' actions were intended to chill [his] First Amendment" rights is an allegation that the prosecutors played a role in the grand jury's release of the report--the chilling effect and injuries would not have occurred had defendants not published the report.

Prosecutors are absolutely immune for their conduct in "initiating a prosecution and in presenting the State's case" because such activities are "intimately associated with the judicial phase of the criminal process." *Imbler* 424 U.S. at 430. Prosecutors enjoy immunity from section 1983 actions "so long as the actions complained of appear to be within the scope of prosecutorial duties." *Price v. Moody* 677 F.2d 676 677 (8th Cir. 1982). Thus the courts have held prosecutors to be absolutely immune when appearing before grand juries to present evidence or otherwise perform their prosecutorial functions such as preparing and signing indictments. See *Burns v. Reed* 114 L.Ed.2d 547, 561 & n.6 (1991) (citing cases). In these cases people who were the target of grand jury investigations have been unable to maintain lawsuits against the prosecuting attorney even after having alleged bad faith and vindictiveness during the prosecutorial process. See e.q. *Buckley v. Fitzsimmons* 919 F.2d 1230, 1243 (7th Cir. 1990), *vacated and remanded* 112 S.Ct. 4O (1991) *adhered to on remand* 952 F.2d 965 (7th cir. 1992) (per curiam) (person indicted brought suit against prosecutors for their role in presenting the case to a grand jury; immunity for prosecutor upheld after reconsideration in light of Burns); *Grant v. Hollenbach* 870 F.2d 1135 (6th Cir. 1989) (person indicted brought suit against prosecutor for prosecutor's acts in presenting facts to grand jury; immunity granted to prosecutor); *Baez v. Hennessy* 853 F. 2d 73 (2d Cir. 1988), cert. denied 488 U.S. 1014 (1989) (person indicted brought suit against prosecutor who prepared and presented the indictment; New York law authorized the prosecutor to take such actions and prosecutor found absolutely immune). Likewise people aggrieved by a prosecutor's decision to present evidence to a grand jury in a manner calculated to obtain a no bill also have found their

suits barred on immunity grounds because such a decision is analogous to the prosecutors' protected function of deciding whether or not to prosecute an individual. *Morrison v. City of Baton Rouge* 761 F. 2d 242, 248 (5th Cir. 1985) .

A prosecutor is not entitled to immunity however merely because the challenged actions occurred at some point during the course of a grand jury proceeding. "the critical issue for immunity purposes is whether a prosecutor is acting within his 'quasi-judicial' role or his administrative/investigative role." *Rose v. Bartle* 871 F.2d 331,46 (3d Cir. 1989) . Thus, a prosecutor who has leaked information during the course of secret grand jury proceedings would not necessarily be subject to absolute immunity. *Id.* Moreover the presumption is that the government official possesses qualified rather than absolute immunity and the burden is on the official to show that absolute immunity is justified for the function in question. *Burns* 111 S.Ct. at 1939. The Supreme Court has been "quite sparing" in its recognition of absolute immunity and it has refused to extend this immunity "any further than its justification would warrant." *Id.* (citations omitted).

When deciding whether to extend absolute immunity to a prosecutor's actions a court must look to general factors the first of which is "the common law and other history." *Burns* 111 S.Ct. at 1943 (citation omitted). absent a tradition of immunity comparable to the common-law immunity from malicious prosecution which formed the basis for the decision in *Imbler* the Supreme Court has not been inclined to extend absolute immunity from liability under section 1983. *Id.*

Here I find no historical or common-law support for extending absolute immunity to cover the prosecutor's actions alleged to have taken place here. The key fact here is that DeCamp was from the record before us not a target of the grand jury investigation and was not prosecuted by the special prosecutors in any way. DeCamp was never requested in any manner to appear before the grand jury.The

prosecutors could not have been performing a prosecutorial function by "co-authoring" a grand jury report to include gratuitous defamatory statements about an individual who was not a target of the grand jury investigation and was not in any way being prosecuted. Although the grand jury was permitted to issue a report about the incident or incidents which caused it to be called the prosecutor has no analogous historical or common-law right to "co-author" such a report.

I emphasize the narrowness or my position. The prosecutors *would* enjoy absolute immunity if the prosecutors had indeed initiated a prosecution against DeCamp. Prosecutors enjoy their absolute immunity for quasi-judicial acts they undertake when *prosecuting* individuals see *Imbler* 424 U.S. at 430 such as preparing an indictment naming DeCamp as an indicted or an indicted co-conspirator. See *Baez* 853 F.2d at 75. Those facts however are not present here as there is no indication that the prosecutors were exercising their traditional broad discretion to bring charges against DeCamp.

The next factor to be considered in deciding whether to extend absolute immunity to the prosecutors' actions is the risk of vexatious litigation. See *Burns* 111 5. Ct. at 1943. In *Burns* the Court concluded that the giving of legal advice to police did not incur this risk because "a suspect or defendant is not likely to be as aware of a prosecutor's role in giving advice as a prosecutor's role in initiating and conducting a prosecution." *Id*. A person in DeCamp's position whose only involvement in a criminal investigation was to provide information that led to the formation of a grand jury would be even less likely to be aware that prosecutors would co-author and publish a report criticizing his motivations. Thus the risk of vexatious litigation as a result of not extending absolute immunity to the prosecutors' actions here is slight.

The final factor to be considered is whether the prosecutors' actions would likely be checked other than through civil litigation. This presents a closer question. As the Court acknowledged in *Burns*

several checks exist outside the courts to prevent abuses of authority by prosecutors but some out-of-court activities such as providing legal advice to the police will not be so checked especially if the suspect is not eventually prosecuted. *Id.* at 1944. Here the actions alleged to have taken place did occur in a court albeit a quasi-judicial proceeding. However as in *Burns* DeCamp was never accused of criminal activities and would therefore be unable to subject the prosecutor's action to the "crucible of the judicial process." *Id.* (quoting *Imbler* 424 U.S. at 440).

In sum I find that the prosecutors did not meet their burden of placing their actions within a tradition of immunity and that their actions were not so intimately tied to the judicial process as to warrant extending absolute immunity to this case. I do not address whether or not the prosecutors possessed qualified immunity as this depends upon evidence of "circumstances and motivations of [their] actions" that is not available on a motion to dismiss. See *Imbler* 424 U.S. at 419 n.13. I would also leave to the district court the resolution of whether the clerk of the court must be joined as a necessary party to afford the requested relief of expungement.

V.

Accordingly the court affirms. Judges Heaney Fagg and Bowman hold the court has subject matter jurisdiction over DeCamp's claims and the grand jurors possess absolute immunity in this case. Judges Fagg and Bowman hold in their separate concurrence the special prosecutors also possess absolute immunity in this case. Judge Heaney would hold however the special prosecutors are not entitled to absolute immunity.

FAGG Circuit Judge with whom BOWMAN Circuit Judge joins concurring in Parts I II III and V and writing separately for Part IV.

We believe the special prosecutors are absolutely immune from SS.1983 liability for helping the grand jury draft an official report permitted by Nebraska law after the grand jury's investigation into possible criminal activity by the managers of a failed credit union ended without indictments.

In this lawsuit DeCamp seeks to hold the special prosecutors liable for their role in preparing a report expressing the grand jurors' opinion that DeCamp's accusatory memorandum sent them on a wild goose chase for "personal political gain and revenge." *Ante* at 2. According to DeCamp's complaint, he alleges the special prosecutors prepared the report for the grand jury from "statements made by the [jurors]." DeCamp Compl. paragraphs 12, 13. DeCamp concedes the report is "a judicial document" containing "nothing more than a compilation of wide ranging opinions of the grand jury." Appellant's Brief at xiii; Appellant's reply brief at 1. DeCamp does not allege the grand jury published the report without approving it. See DeCamp Compl. pargraph 19. Nevertheless, Decamp contends the special prosecutors "stepped outside the scope of their official duties and responsibilities when they co-authored the [grand jury's] report." *Id.* paragraph 16. We disagree.

Under Nebraska law, special prosecutors are authorized to serve as legal advisors to the grand jury. See *Neb. Rev. Stat.* SS.29-1408 Reissue 1989) SS.23-1208 (Reissue 1987). Having considered this statutory authorization de novo see *Salve Regina College v. Russell* 111 S.Ct.1217, 1221 (1991) we agree with the district court that the special prosecutors helped the grand jury prepare its report in their capacity as the grand jury's legal advisors. Our conclusion the special prosecutors acted within the scope of their duties does not end our inquiry however. We must decide whether the duty in question justifies absolute immunity.

To decide whether absolute immunity should protect the special prosecutors for their actions in this case we focus on the

function being performed rather than the special prosecutors' status. *Burns v. Reed* 111 S.Ct. 1934, 1939 (1991); *Brown v. Griesenauer* 970 F.2d 431,436 (8th Cir. 1992). Under the functional approach absolute immunity protects prosecutors for their acts that are "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman* 424 U.S. 409 430 (1976); see *Brown* 970 F.2d at 435. "There is widespread agreement among the Courts of Appeals that prosecutors are absolutely immune from liability under 1983 for their conduct before grand juries." *Burns* 111 S. Ct. at 1941 n.6. Courts have extended *Imbler* immunity to prosecutors who while acting as the grand jury's legal advisor help the grand jury perform its quasi-judicial responsibilities. See *Baez v. Hennessy*, 853 F.2d 73, 75 (2d Cir. 1988) (drafting grand jury indictments) cert. denied 488 U.S. 1014 (1989); *Fields v. Soloff* 920 F.2d 1114 1120 (2nd Cir. 1990) (advising the grand jury of the judge's orders).

We believe a grand jury report that explains why indictments were not returned after an investigation of highly-placed people is as important to the overall well-being of the judicial system as indictments. *See ante* at 4-6. Accordingly we held in Part III that the grand jurors made their comments about DeCamp in "the exercise of a discretionary quasi-judicial function absolute immunity protects." *Id.* at 5. The special prosecutors' authorized actions at issue here--helping the grand jury prepare their judicial document--put the prosecutors in the midst of an activity "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430. It would be anomalous to grant absolute immunity to the grand jurors for reporting their opinions but to allow civil suits against their adjuncts for following the grand jury's drafting requests. See *Mitchell v. McBryde* 944 F.2d 229 230-31 (5th Cir. 1991) (law clerks assisting judge carry out judicial functions entitled to absolute immunity); *Oliva v.Heller* 839 F.2d 37 40 (2d Cir. 1988) (same). Thus we conclude the special prosecutors are entitled to absolute immunity for their actions.

The same common-law rationale that supports absolute prosecutorial immunity for trial-related activities supports similar immunity in this case. See *Burns* 111 S. Ct. at 1941-4 (discussing relevant ractors for extending absolute immunity to particular function); *Imbler* 424 U.S. at 421-29 (same). Prosecutors have historically enjoyed absolute immunity for conduct related to judicial proceedings. See *Burns* 111 S. Ct. at 1941. *Briscoe v. LaHue* 460 U.S. 325, 335 (1983) (common law absolute immunity protected all persons integral to the judicial process). In addition prosecutors assisting the grand jury perform its quasi-judicial duties would risk entanglement in vexatious litigation if they were not absolutely immune from civil liability. See *Burns,* 111 S.Ct. at 1942-44; *Imbler,* 424 U.S. at 424-25. DeCamp's lawsuit shows how disgruntled litigants upset with the grand jury but unable to sue the grand jurors may vent their wrath on the prosecutors who are duty bound to work with the grand jury. Prosecutors who faithfully carry out the wishes o£ the grand jury should not be "a lightning rod for harassing litigation aimed at" the grand jury. *Kermit Constr. Corp. v. Banco Credito y Ahorro Ponceno,* 547 F.2d 1, 3 (lst Cir. 1976) (receiver carrying out appointing judge's orders shares the judge's absolute immunity). Finally there are checks other than civil liability on special prosecutors who help the grand jury draft an official report. The grand jury itself serves as a judicial check because it may reject the prosecutors' input. See *Burns,* 111 S.Ct. at 1942. Further the prosecutors are not beyond the reach of the law or professional discipline for willful deviations from duty. See *Imbler* 424 U.S. at 428-29.

The need for the grand jury to receive accurate untempered legal advice from prosecutors supports our conclusion. Apprehension over potential damages liability would provide prosecutors a powerful incentive to avoid giving meaningful advice and assistance on subjects likely to provoke civil lawsuits. "the resulting timidity would be hard to detect or control and it would manifestly detract from" the grand jury's effectiveness as a judicial tribunal. *Forrester*

v. White 484 U.S. 219, 227 (1988).

In our view the special prosecutors have satisfied their burden of showing that absolute immunity is justified for their actions in this case. *Burns* 111 S. Ct. at 1939. Thus we hold the special prosecutors are absolutely immune from DeCamp's lawsuit.

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1. This section states in relevant part: "Any grand jury called pursuant to this section shall be limited in its charge, powers duties, proceedings, indictment and report to the review of the incident or incidents which caused it to be called."

2. This section states in relevant part: "Whenever the county attorney is required by the grand jury of any court sitting in his county it shall be his duty to attend for the purpose of examining witnesses in their presence or of giving them advice in any legal matter." The special prosecuting attorney appearing before a grand jury shall act in the place of the county attorney "in like manner as though county attorney." *Neb. Rev. Stat.* SS. 29-1408 (Reissue 1989).

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 91-1260NEL

John W. DeCamp,
Appellant,

vs.

Douglas County Franklin Grand Jury, Michael Flanagan, Foreman, in his official and individual capacity; John Does, 1-15, individual jurors, in their official and individual capacities; Samuel Van Pelt, in his individual capacity; Terry C. Dougherty, in his individual capacity,

Appellees.

Appeal from the United States District Court for the District of Nebraska

Judgment

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

Nov. 2, 1992

A true copy.
Attest: (signed)
Clerk, U.S. Court of Appeals, Eighth Circuit.
MANDATE ISSUED 12/2/92

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF NEBRASKA

John W. DeCamp, Plaintiff, v. Douglas County Franklin Grand Jury, et al., Defendants.	CV90-L-345 Memorandum and Order

The plaintiff, John W. DeCamp, has filed this suit against Douglas County Franklin Grand Jury of 1990, the grand jurors, the grand jury prosecuting attorney, and the grand jury assistant prosecuting attorney, for damages and other relief, because of the grand jury report. The grand jury did not indict DeCamp and the report did not accuse him of any criminal act but stated a derogatory opinion about him. DeCamp alleges that this statement was a misuse of power and authority by the grand jurors and the prosecuting attorney and his assistant. Motions to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure have been filed on behalf of all defendants. I find that I must grant the motions.

Two claims are brought under 42 U.S.C. 1983, and jurisdiction is conferred by 28 U.S.C. SS.1343(3). The other claim is dependent upon pendent jurisdiction.

On a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), I must accept as true the plaintiff's well-pleaded facts, which are to be viewed in a light most favorable to the plaintiff. *Palmer v. Tracor, Inc.*, 856 F.2d 1131, 1132 (8th Cir. 1988). A complaint may be dismissed only if it is clear that no relief could be granted under any set of factual allegations. *Id.* However, conclusions of law and unwarranted deductions of fact are not admitted. *Amalgamated Meat Cutters & Butchers Workmen of North America v. Wetterau Foods. Inc.*, 597 F.2d 133, 135 (8th Cir. 1979).

FACTS

According to DeCamp's complaint, from March 19, 1990, to July 24, 1990, the defendants were engaged in a grand jury investigation into the Franklin Community Credit Union, located in Omaha, Nebraska. On or about January 18, 1990, DeCamp claims to have written a memo to Bob Dorr, a reporter for the *Omaha World Herald* newspaper. The complaint says that this memo was widely disseminated in the Omaha area and that DeCamp's memo "played a major role in bringing about the formation of the Grand Jury" Complaint at 2. I must accept that as true for purposes of resolving these motions to dismiss.

DeCamp was never asked to appear before the grand jury. There is no allegation that he requested to testify and was refused. Like any other citizen, he could have requested to testify. *Neb. Rev. Stat.* 29-1410.01 (Reissue of 1989), states that any person may request the prosecuting attorney or grand jury for permission to testify and, failing there, may petition the court for a hearing on the denial of his request.

On July 25, 1990, the grand jury issued its report, which was made available to the *Omaha World Herald.* DeCamp alleges that the grand jury prosecuting attorney and assistant prosecuting attorney helped author the report, which included the following statement:

"It is our opinion that DeCamp issued his memorandum for personal political gain and possible revenge for past actions alleged against him. From personal experience, and the bitterness engendered from media attacks, an attorney of his statute should be more discreet."

DeCamp alleges that the publication of this statement was malicious, intentional, negligent, and done in reckless disregard for his personal and professional reputation and in violation of his constitutional and

statutory rights. He claims that a proximate result of the publication has been his suffering of emotional distress, humiliation, outrage, damage to reputation, loss of employment and wages, attorney fees and costs, and other damages to be proven at trial.

DeCamp's first cause of action alleges that the publication of the statement violated his due process rights under the Fourteenth Amendment to the United States Constitution. He does not enumerate what substantive rights under the Fourteenth Amendment have been violated, however. To determine whether due process requirements apply in the first place, We must look to the nature of the interest at stake. *Board of Regents v. Roth*, 408 U.S. 564, 570-71 (1972). The Fourteenth Amendment is not an enumeration of protected rights but must be read in conjunction with other clauses in the Constitution to determine its coverage. *Carrol v. Johnson*, 565 S.W.2d 10, 16 (1978). As the specific allegation is of intentional dissemination of statements "against plaintiffs sic] reputation . . . without providing . . . due process rights" I assume that the cause of action charges denial of procedural due process in relation to a liberty interest in his reputation.1 The second cause of action vaguely alleges a false light defamation claim under state law, and the third cause of action alleges a*(1)* violation of the plaintiff's First Amendment right of free speech.

The Grand Jury

Pursuant to *Neb. Rev. Stat.* SS. 29-1401 (Reissue of 1989), a state district court called a grand jury. The statute says: "Any grand jury called pursuant to this section shall be limited in its charge, powers, duties, proceedings, indictment, and report to the review of the incident or incidents which caused it to be called." I note that the section specifically refers to a grand jury report and conclude that a

1 Damage to reputation does not support a finding of a liberty or property interest protected by the 14th Amendment. *Paul v. Davis*, 424 U.S. 693 (1975): *Green v. DeCamp*, 612 F2d 368,369 (8th Cir. 1980)

grand jury therefore has the authority to issue such a report. I further note that the statute limits the grand jury's investigation to those "incidents which caused it to be called." Crediting DeCamp's allegation that his memo "played a major role in bringing about the formation of the Grand Jury," it is only logical that the issuance of the memo was an "incident" which caused the grand jury to be called. DeCamp cannot now complain that his issuance of the memorandum was scrutinized by the grand jury, when it was that very act that caused the grand jury to be called in the first place. In short, the grand jury took the legal step that DeCamp's memorandum predictably triggered it to take.

Given the nature and purpose of a grand jury, namely, to inquire into the existence of possible criminal conduct and to return well-founded indictments, its investigative powers are necessarily broad. *Branzburg v. Hayes*, 408 U.S. 665, 687-88 (1972). "A grand jury has a right . . . to a fair margin of reach and material in seeking information, not merely direct but also as a matter of possible light on seemingly related aspects whose significance it is seeking to uncover. Some exploration or fishing necessarily is inherent and entitled to exist in all documentary productions sought by a grand jury." *Universal Mfg. Co. v. U.S.*, 508 F.2d 684, 686 (8th Cir. 1975), quoting *Schwimmer v. U.S.*, 232 F.2d 855, 862-63 (8th Cir. 1956), *cert. denied*, 352 U.S. 833 (1956). If a grand jury does go on a "fishing expedition"--that is, outside its scope of authority--the courts are not powerless to act. *Ealy v. Littlejohn*, 569 F.2d 219, 227 (5th Cir. 1978). However, nothing in the record indicates that this grand jury inquired, investigated, or reported outside its scope of authority.

Two other statutes are applicable to this case. *Neb. Rev. Stat.* SS. 29-1404 sets forth the grand juror's oath, which requires diligent inquiry and true presentment of "all such matters and things as shall be given you in charge or otherwise come to your knowledge, touching the present service. . . . You shall present no person through malice, hatred or ill will, nor shall you leave any person unpresented

through fear, favor or affection . . .." In taking this oath, the grand jury was duly informed of the limits on its inquisition. The grand jury knew that it was forbidden from acting through malice towards DeCamp every bit as much as it knew that it owed him no allegiance. I find that the grand jury did not act outside scope of authority by investigating DeCamp's purpose in issuing the memorandum or by counseling in its report a different behavior.

The only remaining issue under SS.1983 is whether the statement in the report is actionable as violative of DeCamp's First and Fourteenth Amendment rights.

However, I need not reach the merits at issue, because grand jurors in the performance of their duties possess an absolute immunity from liability. *Imbler v. Pachtman*, 424 U.S. 409, 423-24 (1976). This immunity has long been based in the English common law, as well as adopted by caselaw in his country. *Id.* at 423, n. 20, citing Floyd v.Barker, 12 Coke 23, 77 Eng. Rep. 1305 (1608), *Turpen v. Booth*, 56 Cal. 65 (1880), *Hunter v. Mathis*, 40 Ind. 356 (1872) Grand jurors and prosecutors have been referred to as "quasi-judicial" officers possessing "quasi-judicial" immunities, *Imbler*, at 423, n. 20, and the common-law absolute immunity for judges for acts committed with their judicial authority is beyond question. *Id.* at 41B. See also, Bradley v. Fisher,(2) 213 Wall. 335 (1872), Pierson v. Ray, 386 U.S. 547, 554-55 (1967).

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2 "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, ... This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.' " (citations omitted). *Imbler*, 424 U.S. 409, 418, n. 12 (1976). This is judicial immunity, and prosecutors and grand jurors are quasi-judicial officers possessing quasi-judicial immunity, so they, too, cannot be liable for damages for rightfully exercising their powers.

The Restatement of Torts, 2nd, SS. 589 (1977), states: "A member of a grand or petit jury is absolutely privileged to publish defamatory matter concerning another in the performance of his function as a juror, if the defamatory matter has some relation to the proceedings in which he is acting as juror." As noted earlier, DeCamp's memorandum played a significant role in bringing about the grand jury, and the comment by the grand jury had some relation to the proceedings in which its members were acting as jurors. Comment C to 589 notes that where a grand jury is authorized to bring charges only by indictment, the privilege does not extend to informal reports, unless the jurors reasonably believe the reports are within their authority. Because the report in question is statutorily provided for at *Neb. Rev. Stat.* SS.29-1401 (Reissue of 1989), and at *Neb. Rev. Stat.* SS. 29-1420 (Reissue of 1989), it is a formal report and its authors are privileged in their communications .

Title 42, U.S.C. 1983, under which the plaintlff's first and third causes of action have been brought, has not abrogated the immunities just mentioned. *Imbler*, at 418. The co-existence of that Statute and the general principles of tort immunity were examined by the United States Supreme Court in *Tenney v. Brankhove*, 341 U.S. 367 (1951). The *Tenney* Court in examining legislative immunity concluded that 1983 is to be read in harmony with, and not in derogation of, the general principles of tort immunities and defenses. *Id.* at 372-76. The holding in *Tenney* also applies to judicial immunity. *Imbler*, at 418, 424. Since absolute immunity defeats a suit at the outset, *Id.* at 419, n. 13, *Ray v. Pickett*, 370, 371 (8th Cir. 1984), DeCamp's complaint cannot stand, and the motion to dismiss the grand juror defendants must be granted.

The Grand Jury Prosecutors

The same absolute immunity that applies to grand jurors applies to prosecutors. *Id.* at 423-24. "The public trust of the

prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." *Id.* at 424-25. The absolute immunity of prosecutors is based on a policy of protecting the judicial process. *Id.* at 439, White, J. concurring. Both grand jurors and prosecutors must be free to exercise their best judgment without fear of being held liable for damages. *Ray*, 734 F.2d at 371, *Gray v. Bell*, 712 F.2d 490, 497 (D.C. Cir. 1983), *Martone v. McKeithen*, 413 F.2d 1373, 1376 (5th Cir. 1969).

The prosecutor's scope of authority is a question requiring quasi-judicial discretion. *Id.* at 1390. Nebraska statutory law confirms this at *Neb. Rev. Stat.* SS. 23-120 (Reissue of 1987), which says:

"Whenever the county attorney is required by the grand jury of any court sitting in his county, it shall be his duty to attend for the purpose of examining witnesses in their presence, or of giving them advice in any legal matter, and to issue subpoenas and other writs of process; to bring in witnesses and to draw up bills of indictment: but he shall not be present with the grand jury when an indictment is being considered and found by said grand jury."

The examination of witnesses, giving of legal advice, and drafting of indictments are all exercises within the prosecution's scope of authority requiring quasi-judicial discretion.

The grand jury prosecutor and assistant prosecutor in this case clearly did not act outside their scope of authority if they co-authored the report that mentioned DeCamp. If the prosecutors have the authority to "give legal advice in any matter," and to draft bills of indictment, surely they have the authority to assist the grand jury in drafting a report. At the least, this could fall under the category of giving legal advice. What DeCamp may be implying is that it was the prosecutors who inserted the disparaging comments in the report.

I have seen no evidence one way or the other on this, not that it would be of consequence, given the absolute immunity of the prosecutors and the grand jurors. I find that the prosecutors did not act outside their scope of authority.

Decamp's Cited Authority

DeCamp principally relies on two cases to support his causes of action. First, he cites *U.S. v. Briggs*, 514 F.2d 794 (5th Cir. 1975), for the proposition that a grand jury exceeds its authority and is, therefore, liable where it charges individuals with criminal conduct without indicting them. *Briqgs* is factually distinguishable for several reasons. First, *Briggs* was accused of being a conspirator, but not indicted as one, while DeCamp was never accused or charged by the grand jury with any criminal conduct. The statement he objects to is in no manner an accusation or charge of criminal wrongdoing. It may not be a statement of praise, but neither is it accusatory. The first four words clarify what it is: "It is our opinion . . .." Stating in a grand jury report that in the opinion of the grand jury an individual acted for personal political gain and possibly for revenge is certainly within the discretionary judgment of a grand jury.

Second, in *Briggs* the document containing the offending statement was an indictment that accused certain individuals of crimes, but did not make them defendants for trial. *Id.* at 801. "No claim is made, indeed none can be made, that it was or purported to be a grand jury 'report'." *Id.* The document at issue here is a statutorily-authorized report.

Third, *Brigqs* involved a federal grand jury, which had questionable authority to issue a report, while this case involved a Nebraska county qrand jury operating under Nebraska law, Which specifically provides for grand jury reports. See, *Neb. Rev. Stat.* SS. 29-1401, 29-1420. Notably, Judge Sirica, in the Watergate grand jury case, *In re Report and Recommendation of June 5. 1972 Grand Jury,*

370 F. Supp. 1219 (D.D.C. 1974), upheld the power of a federal grand jury to issue a report that was a simple compilation of the information gathered by the grand jurors. The Seventh Circuit also distinguished between reports that accuse and reports that set forth information learned by the grand jurors. See, *Application of Johnson,* 484 F.2d 791 (7th Cir. 1973). I also note that *Briggs* concluded that "so long as the federal grand jury acts within the limits of its powers to investigate, to indict, and possibly to issue limited types of reports, the governmental interest in these important and historical functions tips the balance against requiring the full panoply of due process." U.S. v. Briqqs, 514 F.2d at 806. That same reasoning should also apply to a state grand jury and, therefore, it cannot be said that DeCamp has been denied due process.

The other case DeCamp heavily relies upon is *Application of Jordan*, 439 F. Supp. 199 (1977). Just as in Briggs, an individual was named in an indictment as an unindicted co-conspirator and sought to have his name expunged from all documents. While the grand jury in *Jordan* did mention Jordan in their report, it was in conjunction with his being named in the indictment. Jordan, 439 F. Supp. at 201. The court in that case held that "the inescapable conclusion is that, even labeled as a 'report', the document naming petitioner Jordan as a co-conspirator in described criminal activity was an improper exercise of the grand jury function." *Id.* at 205. Since *Jordan* and *Briqgs* are factually similar, I see no reason to apply their conclusions to a fact pattern as markedly different as the one presented here.

DeCamp was not named in the indictment and was not accused of any illegal act by the report. At most, what exists here is a grand jury's opinion that a former public official, now a public figure, acted for personal political gain and possibly out of spite. The grand jury commented negatively upon his actions, given his professional knowledge and experience. Political officials and public figures are exposed to rebukes as serious as this one on a frequent basis in the

media and elsewhere. In this instance, the comments were within the discretion and scope of authority for the grand jury to make in their report. In any event, DeCamp's causes of action against the grand jurors and the prosecuting attorneys are all barred by the absolute immunity in which they are cloaked by law.

IT IS ORDERED, in accordance with this memorandum, the defendants' motion to dismiss, filings 6 and 7, are granted.

Dated January 3, 1991.

BY THE COURT
Warren Urbom
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

John W. DeCamp, Plaintiff, vs. The Douglas County Franklin Grand Jury, et al., defendants.	CV90-L-345 Judgment

In accordance with the memorandum on the defendants' motions to dismiss,

IT IS ORDERED that the action is dismissed.

Dated January 3, 1991.

BY THE COURT

(signed)
Senior United States
District Judge

TEXT OF 42 U.S.C. 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States of other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any act of Congress application exclusively to the District of Columbia shall be considered to be a statue of the District of Columbia.